ORIGINAL BRIEF

ON BEHALF OF THE APPELLANT

KARL JAN KIRCHBERG

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1979

NO. 79-1388

KARL J. KIRCHBERG

Appellant,

--V--

JOAN PAILLOT FEENSTRA

Appellee.

--V--

EDWIN W. EDWARDS
and STATE OF LOUISIANA
ON APPEAL FROM THE
FIFTH CIRCUIT COURT OF
APPEALS FOR THE UNITED STATES
OF AMERICA

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2.

Reference to the official and unofficial reports of the opinions delivered in the Lower Courts

The official and the unofficial reports of the opinions delivered in the United States District Court for the Eastern District of Louisiana, and the Fifth Circuit Court of Appeals for the United States of America are found in the appendix at pages A-1 through A-84.

3.

A Concise statement of the grounds on which jurisdiction is invoked

This decision is appealed pursuant to Title 28 U.S.C.A. Section 1254, which states as follows: "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such petitioner,

and the review on appeal shall be restricted to the federal questions presented."

The Fifth Circuit Court of Appeals rendered its decision in this matter on December 12, 1979, (Appendix page 40). The Appellant, Karl J. Kirchberg, filed his jurisdictional statement on March 8, 1980, and Probable Jurisdiction was Noted on April 28, 1980.

4.

Constitutional Statutes upon which the CASE Involves

The following Statutes are involved in this litigation:

(a)

U.S.C.A. Const. Amend. XIV §1 page 33, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(b)

Art. 2404. Rights and restrictions of husband as master of community. Art. 2404. The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which

they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property or otherwise disposed of the same by fraud, to injure his wife, she may have her action against heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud. (as amended by Acts 1926, NO. 96)

Editorial Comment

R.S. 9:2801 - 9:2804 (acts 1921, Ex. Sess.,NO. 35) provides for a designation and declaration of family home and recordation thereof. Thereafter the husband may not sell or mortgage the family home except with the consent of the wife. L.S.A. - C.C. art. 2404, Volume 9A, page 346.

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Questions Presented By The Appeal

1) Does Louisiana Civil Code Article 2404 violate the equal protection clause of the Fourteenth amendment: U.S. Constitution Amendment 14?

2) Did the Court of Appeals only hold that Article 2404 of the La. C.C. is unconstitutional or did the Court in effect overrule principles of the Civil Law of Louisiana enumerated and expressed throughout the Civil Code?

3) Does the Decision rendered by the Fifth Circuit Court of Appeals apply to Karl J. Kirchberg, thus preventing the Civil Sheriff of Orleans Parish from seizing the Feenstra home, or is the decision prospective only in that the holding does not apply to Kirchberg, and therefore he can proceed to enforce the mortgage and have the Feenstra home seized and sold?

Concise Statement of The Case

This particular litigation originated from an act of mortgage executed in 1974 by Mr. Feenstra as the mortgagor and Karl J. Kirchberg, as the mortgagee. The mortgage covered the family home, and said domicile was registered in the names of Mr. and Mrs. Feenstra. The indebtedness represented by the promissory note, was never repaid. As a result, the Civil Sheriff for the Parish of Orleans, State of Louisiana, by executory process, was directed and ordered to seize and to sell the Feenstra Home. Kirchberg subsequently filed a petition for declaratory judgment against Mrs. Feenstra. She opposed the foreclosure on the property, contending that Kirchberg had violated the Truth In Lending Act, 15 U.S.C. 8:1601, et. seq. Thereafter, Kirchberg instituted a proceeding in the United States District Court for the Eastern District of Louisiana, praying for a declaratory judgment

that he had not violated the act. Mrs. Feenstra answered the complaint, and she asserted two counterclaims. In the first counterclaim, she sought rescission of the mortgage for Truth-In-Lending violations. In the second counterclaim, she sought a declaration that article 2334 of the Louisiana Civil Code was unconstitutional, because it violated the equal protection and due process clauses of the fourteenth amendment. The second counterclaim was asserted against the Governor of the State of Louisiana and the State of Louisiana, as well as against Karl J. Kirchberg. The State of Louisiana moved for summary judgment on Mrs. Feenstra's second counterclaim. The District Court granted the summary judgment against Mrs. Feenstra and she appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit held that Article 2404 of the Louisiana Civil Code, violated the equal protection clause of the Fourteenth Amendment. Appellant, Karl J. Kirchberg has appealed the decision of the Fifth Circuit

Court of Appeals to This Honorable Tribunal.

7

Summary of Argument

Karl J. Kirchberg contends that Article 2404 of the Louisiana Civil Code does not violate the equal protection clause of the Fourteenth Amendment. Furthermore, the deletion of this Article from the Civil Code of the State of Louisiana will overrule major principles of the Louisiana Civil Code, thus resulting in a chaotic state of affairs within the Commercial Law of Louisiana. Finally, Kirchberg contends that the Fifth Circuit Court of Appeals decision should be applied prospectively so as to permit Kirchberg to enforce his mortgage against the Feenstra Home , in the event that Article 2404 is declared to be unconstitutional.

8.

Argument

It is the contention of the appellant, Karl J. Kirchberg, that Article 2404, La. C. C. (1870) (as amended by acts 1926 No. 96) does not violate the equal protection clause of the Fourteenth Amendment. The appellant would turn the attention of this Honorable Tribunal to the language and analysis of the Firth Circuit Court of Appeals opinion in order that the scope of the errors in said judgment be identified.

The appellant would argue that the lower court decisions relied upon in the opinion are distinguishable upon their facts, from the instant factual situation. In Trimble vs Gordon, 430 U. S. 762, 97 S. Ct. 1459 (1977), the State law was held to violate the Fourteenth Amendment Equal Protection Clause, because illegitimate children faced discrimination under the intestate laws. Also, in Reed vs Reed, 404 U. S. 71, 92 S. Ct.

251 (1971), State law granted a statutory preference to males as administrators of the estates of intestates. This law also fell under the equal protection clause of the Fourteenth Amendment. Furthermore, Craig vs. Boren, 429 U. S. 190, 97 S. Ct. 451 (1976), held the two sections of an Oklahoma Statute to be unconstitutional because the gender-based differential constituted a form of invidious discrimination against males age 18-20 years of age, and thus violative of the Fourteenth Amendment. In the recent decision of Orr vs. Lillian M. Orr, 99. S. Ct. 1102 (1979), 440 U. S. 268, this Court struck down the Alabama State Statute which authorized only the husband to pay alimony to his wife. As previously stated, all of these decisions were the foundation for the errors in reasoning advanced by the Fifth Circuit in Kirchberg vs. Feenstra, 609 F.2d., 727 (1979).

It is important to note that in Trimble,

Reed, Craig, and Orr, it was impossible for the disadvantaged person, who had been denied the equal protection of the laws, to overcome the insurmountable barrier established by State Law. The disadvantaged person, in each of these aforementioned cases, was dependent upon the will, decision, and action, of a third person in the determination of his or her economic destiny.

In Trimble, the decedent could have drafted a will devising property to his offspring, but he did not choose to do so. The important point to note is this: It was impossible for the illegitimate child to legally force his father to bequeath property to him. Similarly, in Reed, the power to name an administrator was within the reach and grasp of the testator - not the disadvantaged female administrator. In Craig, there was no legislative escape devise whereby, males and females might drink at the same age.

However, in our present factual situation, Mrs. Feenstra, the "supposedly disadvantaged" individual, possessed the power to prevent Mr. Feenstra from encumbering their household. That power resided in Article 2334 of the La. C.C. (1870), which provided that the wife could prevent the mortgage of her home by filing a declaration by authenic act that her consent was required for her husband to mortgage community immovable property. The article provided that the declaration be recorded in the mortgage and conveyance records of the Parish in which the property was situated. It is important to note that the authentic act in Louisiana only requires that a Notory and Two Witnesses execute the instrument, LSA-C.C. Art. 2234, Volume 8, page 335. The only other costs would be recording expenses and the possible expense for the use of an attorney. However, an attorney's fee would not be required. Also,

as is stated in Corpus Christi Parish Credit Union vs. Martin (S. Ct. La.) (1978) 358 So. 2d. 295, (page 298), "Louisiana statutes provide a simple method for the wife to prevent the alienation of the family home. At the time of the execution of this mortgage, R. S. 9:2802 . . . provided that the wife . . ., can file in the conveyance records a designation of the family home, and 'it may not thereafter be validly sold or mortgaged during the marriage by the husband except with the consent of his wife expressly set forth in the act, and signed by her.'"

Therefore, the Court of Appeals fell into error at that particular portion of the opinion which emphasized "Transactional Costs." As the Court stated, 609 F. 2d. 727 (page 734) Louisiana law places the burden and expense of obtaining a lawyer and preparing a non-traditional marriage contract on couples wishing to make the wife the community

manager, and it does not place that burden and expense on couples wishing to make the husband the manager." However, the Law of Louisiana was such that no formal antenuptial agreement was needed or required to remedy the present problem. The only prerequisite to the solution of the instant dilemma, was a notorized affidavit - far less expensive than a formal antenuptial agreement. As noted earlier, Mrs. Feenstra failed to utilize the inexpensive remedy provided for her by the Laws of the State of Louisiana. Appellant would further submit that she has been the architect of her own predicament.

The Second issue posed by appellant concerns the deletion of major principles from the Civil Law of the State of Louisiana, if the Fifth Circuit opinion should be upheld. As noted earlier, the appellant contends that Louisiana Law applies a system of balanced equality to the realationship existing

between Husband and Wife. Indeed, the Community Property System is known as a matrimonial regime, and this balanced regime was given emphasis in this Court's noted decision of Labine vs. Vincent, 401 U.S. 532, 91S.Ct. 1017, 28 L. Ed. 2d. 288 (1970). Moreover, Judge Sear gave a lengthy expression to the Louisiana Community Property System in Kirch berg vs. Feenstra, 430 F. Supp. 642 (E. D. La. 1977), in which he upheld the Constitutionality of Article 2404. For the moment, appellant invites this Honorable Tribunal to journey with him on an excursion through the Louisiana Civil Code, as he describes the various features of this balanced and equal regime.

The First 24 articles of the Louisiana Civil Code, [articles 1-23; La. C.C. (1870)] define the nature of the legal system in our jurisdiction, and the manner in which the articles of the Louisiana Civil Code are to

be read and interpreted. Focusing upon (Article 17, La. C. C. 1870) we find that the laws of the State are to be read in pari materia, meaning that they are to be read together and in reference to each other to further clarify their meaning within the entire codal system.

Kirchberg would turn this Honorable Court's attention to Article 2410 of the La. Civil Code of (1870), as a prime example of the system of balanced equality established in the code. As is stated therein, Art. 2410, Volume 9A, page 478 (2410) La. C. C. 1870 "Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains." It is the contention of the appellant that this article was overruled by the decision rendered in Kirchberg vs. Feenstra 609 F. 2d. 727, because the underlying basis and rationale for this article is indeed Article 2404. Beal vs. Ward,

(Ct. of Appeal of Louisiana) (Orleans) (127 So. 423) (1930) Louisiana Bank and Trust Company vs. Pernici, La. App., 372 So. 2d 788 (Second Circuit), (1979) and Creech vs. Capitol Mark, Inc. 287 So. 2d 497 (S. Ct. of La.) (1973); all discuss the relationship between Article 2404 of the La. Civil Code and the power of the wife to renounce her debts of the Community Estate. In summation, it may be said that because the husband is the head and master of the community, the wife is given the option to renounce her one-half interest in the community of acquets and gains, Creech vs. Capitol Mark, Inc. 287 So. 2d. 497, (S. Ct. of La. 1973).at page 508. Hence, it would not be possible after the date of Dec. 12, 1979, to decide which party to the marriage would have the right to renounce the debts of the community estate. Possibly, neither the husband nor the wife would retain this option. If Article 2404 is unconstitutional as of the date of December 12, then Article 2410, an article dependent upon 2404, must logically

also be unconstitutional, and the entire doctrine of renunciation must be modified or deleted completely from the Civil Law of Louisiana.

Furthermore, we are faced with an even more perplexing issue in the field of Commercial Transactions involving Community Immovable Property. Who will have the power and right to alienate community immovable property after the date of Dec. 12, 1979 and before the date of Jan. 1, 1980? Must both the husband and the wife sign all acts of sale or could either sign the act of sale? The answer is again unknown. Who has the power to mortgage community immovable property during that time period? The answer is again unknown. Has not the decision rendered in Kirchberg vs. Feenstra cast a shadow of uncertainty upon all of these aforementioned commercial transactions from the date of Dec. 12, 1979, until the date of Jan. 1, 1980?

The third issue raised by appellant concerns the supposedly prospective application of this decision. As is stated in Kirchberg vs.

Feenstra, 609 F. 2d 727 (1979) at page 735, footnote 19, "our decision today with respect to article 2404, which eliminates that provision from the laws of Louisiana renders unnecessary a decision on the limiting portion of article 2334." Furthermore, as is stated in Kirchberg, at page 735," we apply our decision today prospectively only, because a holding of retroactive invalidity of article 2404 would create a substantial hardship with respect to property rights and obligations within the State of Louisiana."

The appellant would urge this Court to consider carefully the grave consequences which will flow from this decision if the rationale advanced by the Fifth Circuit Court of Appeals is upheld. At first it would appear that according to the aforementioned quotations, that Article 2404 La. C. C. (1870), is unconstitutional as of the date of December 12, 1979. Appellant would submit that if Article 2404 were unconstitutional on the date of December 12, 1979,

and if the decision were prospective only, then by logical inference, the mortgage executed by Mr. Feenstra was valid according to the Fourteenth Amendment on the date of October 22, 1974. Therefore, Kirchberg could proceed to have the Feenstra Home seized and sold in spite of the decision rendered on the date of December 12, 1979.

However, if the decision is prospective only; and if this should mean that the holding applies to Kirchberg and to the Feenstras, thus blocking the seizure and sale of the home, then logically, there will follow great and substantial hardship with respect to property rights and obligations within the State of Louisiana. This result will follow for two reasons, either of which will produce a chaotic situation in the commercial trade of the State of Louisiana. The first situation that will develop concerns all mortgages executed by husbands alone from the date of October 22, 1974, to the present date.

If the Feenstra mortgage signed by the husband, is invalid, then all mortgages executed by the husband alone, without the wife having recorded her declaration by authenic act would be invalid, if said encumbrances were established after the date of October 22, 1974. This would also mean that potentially hundreds or thousands of these mortgages would be declared null and void should the debtors default on payments and the creditors foreclose. This would leave many creditors without a significant legal remedy to enforce the collection of the debts. The underlying security could not be seized or sold. It is obvious that many creditors extended money to debtors during the time period in question, from 1974 to January 1, 1980, having relied upon the Head and Master Laws, article 2404 La. C. C. (1870). The law was declared to be invalid as of the date of December 12, 1979, and if Kirchberg cannot enforce his mortgage against the family home, neither can any other mortgagee-creditor enforce his rights against family homes.

In short, the appellant is arguing with sound logic that it is impossible for the Fifth Circuit Court of Appeals to apply its decision "Prospectively" if the holding also means that he cannot enforce his rights as mortgagee. If he cannot have the Feenstra Home seized and sold, then the decision is truly retroactive to the date of October 22, 1974, and no other mortgagee will be able to seize and to sell family homes encumbered after that date by signature of the husband alone, thus creating the very "substantial hardship" that this decision was supposedly tailored to avoid, Kirchberg vs. Feenstra, 609. F. 2d. 727, at page 735.

Moreover, a variety of perplexing problems would arise in the property and succession law of the State of Louisiana, even if this decision is applied prospectively. As noted earlier, from the date of December 12, 1979, to the date of January 1, 1980, it is impossible to determine who would have the power to alienate, mortgage, or lease, community immovable property within

the family structure. As mentioned earlier, the doctrine of renunciation is also placed in jeopardy, along with other Civilian Doctrines and Principles expressed throughout the Civil Code of Louisiana. Thus, it is apparent that this decision will produce substantial inequitable results even if it is applied prospectively.

9

Conclusion

Thus, the appellant, Karl Jan Kirchberg, prays that the Supreme Court of The United States of America reaffirm the decision rendered in Kirchberg vs. Feenstra, 430 F. Supp. 642 (E. D. La. 1977) and reverse the decision rendered in Kirchberg vs. Feenstra, 609 F. 2d 727 (1979); and declare that Art. 2404 La. C. C. (1870) did not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, and that an order proceed in due course allowing Kirchberg to have the Feenstra Home seized and sold to satisfy the indebtedness owed to the appellant.

In the alternative, should this Honorable Tribunal decide that Art. 2404 La. C. C. (1870) is repugnant to the Fourteenth Amendment of the Constitution, then said appellant would pray that this decision be applied prospectively so that a decree might proceed from The Supreme Court of The United States permitting appellant

to satisfy the indebtedness owed to him by way of seizure and sale of the Feenstra Home.

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CERTIFICATE OF SERVICE

I, Karl J. Kirchberg, appearing as appellant in proper person, and I, Alan Ford Schoenberger, appearing as Attorney Pro Hoc Vice, do affirm on this 26th day of June, 1980, that we have served upon the following named parties by depositing (3) three copies of this brief in a United States Post Office, First Class Mail, Postage Pre-paid and addressed to the following counsel of record on this aforementioned date:

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